Supreme Court, U.S.
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No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

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The central issue in this case is whether journalists at a public station licensed to a state agency and insulated from state political influence can exercise the same news judgment as journalists at other broadcast stations in organizing and broadcasting a bona fide news event. On this point, *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991), and *Forbes v. Arkansas Educ. Television Comm'n.*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*") (App. 1a), reach diametrically opposite conclusions of law. *Chandler* holds that a candidates' debate organized and televised by a state-entity public broadcaster is a non-public forum, from which fringe candidates can be excluded; *Forbes II* holds that such a program is a limited public forum in which fringe candidates must be allowed to participate.

Respondent fails to identify any meaningful factual difference between the case below and *Chandler*. The district court in *Chandler* had enjoined the Georgia Public Telecommunications Commission ("GPTC") from televising two debates unless a Libertarian candidate was included in each. *Chandler*, 917 F.2d at 488. Similarly, Forbes sought an injunction mandating his inclusion in the debate organized by the Arkansas Educational Television Network ("AETN"). *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423, 1426 (8th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 500 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes) ("*Forbes I*") (App. 25a, 29a). Both cases originated in requests for preliminary relief.

Respondent also asserts (Opposition Brief at 6-7) that no circuit conflict exists because *Chandler* relies on *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983), which dealt with individual viewers' claims of a right of access to state-owned

public television stations.[1/] Respondent misses the fact that *Muir's* analysis is based on the role that the state selects for its public television stations — that is, the state's *intent* to create a non-public forum television station so that the licensee can exercise programming judgment over each program in order to meet the public interest standard in Section 309 of the Communications Act, as interpreted by the FCC. *See also United States v. Grace*, 461 U.S. 171, 178 (1983) (government has power to preserve property under its control "for the use to which it is lawfully dedicated.") In other words, Respondent fails to confront the fact that a broadcast station, and each program on the station (except for exempt political "uses"[2/]), are quintessential non-public forums, no matter the identity of the licensee. Respondent seeks a rule that ignores the evidence of Arkansas' intent — the intent inherent in a state's seeking a television license under the Communications Act. This is the very point that the Eighth Circuit failed to analyze below.

1/ Respondent errs in disdaining *Chandler's* reliance on Judge Rubin's concurrence in *Muir*. Under this Court's precedent, Judge Rubin's opinion, the narrowest concurrence in a case with no majority opinion, is the holding of the case and the law of the circuit. *See, e.g., Marks v. United States*, 430 U.S. 188, 193 (1977), *cited in Schneider v. Indian River Community College Found.*, 875 F.2d 1537, 1541 (11th Cir. 1989).

2/ A "use" under Section 315 of the Communications Act, 47 U.S.C. 315, cannot be censored by the licensee. *See, e.g., Farmers Educ. & Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959).

Respondent asserts a novel rule of forum analysis: "Once the topic or subject matter of the forum is specified . . . one can easily determine the common area of speech and class of speakers." (Opposition Brief at 5.) This rule, while a fair restatement of the Eighth Circuit's doctrine in *Forbes II*, 93 F.3d at 504 (App.14a-15a), starkly conflicts with the command in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985), and *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983), that the starting point for determining the type of forum is the state's intent in creating the type of forum, not its intent in selecting the subject matter to be discussed in the forum. Only after the type of forum is determined does one analyze whether "a topic [is] not encompassed within the purpose of the forum" or whether an individual seeking access "is not a member of the class of speakers for whose especial benefit the forum was created." *Cornelius*, 473 U.S. at 806 (citations omitted). Consequently, Respondent emphasizes both the circuit conflict and the important conflict between *Forbes II* and this Court's forum decisions.

Respondent says four times that AETN "disfavor[ed]" Forbes (Opposition Brief at 3, 5) but the record refutes this assertion, and the jury specifically found to the contrary. Respondent also argues that, in another District, a candidate who raised only $6,000 was invited to debate (Opposition Brief at 10 note 3). But the amount of money raised was only one of many factors AETN considered in concluding that Forbes was not newsworthy.

Respondent says it is "unreasonable," "irrational" and "dangerous" for a station to exclude certain candidates (Opposition Brief at 9, 10). To the contrary, it is all that and more for the judiciary to force any television licensee to conduct a debate with the participation of every candidate who

can garner enough signatures to get on the ballot. The fact that, in this particular case, only one candidate was excluded is irrelevant. Even Respondent does not argue that there should be one rule for debates where only three candidates are running and another for races with a greater number of candidates.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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